Filed 2/24/12 In re A.C. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

In re A.C., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. A.C., Defendant and Appellant.	C068528 (Super. Ct. No. JD11197)

Following the denial of his suppression motion, the minor A.C. (minor) pled no contest to possession of a loaded firearm by a prohibited person.[1] (Former Pen. Code, § 12031, subd.

[1] Minor reserved the right to withdraw his plea if the denial of the suppression motion was reversed on appeal.

(a)(1)(2)(D)).[2] The juvenile court declared minor a ward of the court and placed him on probation, subject to various conditions.

On appeal, minor contends the juvenile court erred in denying his suppression motion. We disagree and shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 5, 2011, at around 8:49 a.m., Woodland Police Officer Tim Keeney was dispatched to investigate a group of juveniles, one of whom was reported to be carrying a large knife. The dispatch did not include a description of the juvenile with the knife.

Keeney arrived at the location about six minutes later and saw minor standing by himself in a parking lot. Minor was carrying a small duffel bag in one hand.

Keeney pulled into the parking lot in his marked patrol car without using his siren or emergency lights. He was at least 10 feet from minor, with whom he made eye contact. Minor had a look of concern on his face as Keeney pulled in. He was wearing baggy clothing with a long T-shirt below his waist.

Minor immediately walked away, turned his back to Keeney, and thrust his hands towards his waistband.[3] Keeney got out of

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[2] Penal Code section 12031 has been repealed and replaced in largely the same form with Penal Code section 25850.

[3] In his eight years as a police officer, Keeney had found weapons and contraband in suspects' waistbands, including guns, knives, narcotics, and stolen property. On the approximately 10 occasions he had seen a suspect "shove" something into his

his car, told minor to stop, then drew his gun and followed minor when minor did not stop.

Minor continued walking quickly away from Keeney, still fumbling with his hands at his waistband as though he were "moving something around" or "concealing a weapon." He turned his head and looked at Keeney as he continued to walk away. Keeney had to run before he caught up with minor and ordered him to put his hands up.

Minor eventually put his hands over his head and interlaced his fingers. Keeney holstered his gun and grabbed minor's hands, but minor moved and bent in a "folding over" manner that signaled to Keeney concealment of something in his waistband. Minor did not stop moving until Keeney threatened to use his Taser.

Keeney then lifted up minor's shirt and immediately saw the silver handle of a gun in minor's waistband. He removed the weapon, and took minor into custody. The entire encounter lasted only a matter of seconds.

The juvenile court denied the suppression motion, finding that, while the case was a "close call," Keeney had reasonable suspicion to temporarily detain minor and perform a limited search of minor's person, which consisted of lifting up his shirt to reveal the handle of the gun in his waistband.

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waistband, Keeney found something of interest in the waistband every time.

DISCUSSION

I

The Stop

Minor contends the juvenile court erred in denying the suppression motion because the "detention was unreasonable." We disagree.

On appeal from denial of a suppression motion, all presumptions are in favor of the trial court's factual findings, where supported by substantial evidence, and we review de novo the facts favorable to the People to determine whether the officer's conduct was reasonable under the Fourth Amendment. (*People v. Glaser* (1995) 11 Cal.4th 354, 362; *People v. Ledesma* (2003) 106 Cal.App.4th 857, 862.)

The Fourth Amendment protects against unreasonable searches and seizures. (U.S. Const., 4th Amend.; *Terry v. Ohio* (1968) 392 U.S. 1, 20 [20 L.Ed.2d 889, 905] (*Terry*).) "A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231.)

Minor's argument points out deficiencies in each of the facts articulated in support of the detention. He correctly notes that an anonymous tip by itself cannot support reasonable suspicion absent other indicia of reliability. (*Florida v. J. L.* (2000) 529 U.S. 266, 270 [146 L.Ed.2d 254, 260]; *Alabama v.*

White (1990) 496 U.S. 325, 328-329 [110 L.Ed.2d 301, 308].) He correctly observes that "[m]ere nervous, furtive, or evasive conduct in the presence of police will not justify a detention" (*People v. Raybourn* (1990) 218 Cal.App.3d 308, 312) absent the presence of additional suspicious facts. (*People v. McGaughran* (1979) 25 Cal.3d 577, 590.)

Citing *People v. Superior Court of Yolo County* (*Kiefer*) (1970) 3 Cal.3d 807, minor argues that furtive gestures alone are insufficient to justify detention and search. In *Kiefer*, an officer pulled a car over for speeding. Before the car stopped, the officer saw a woman's head rise from the passenger seat. (*Kiefer, supra*, 3 Cal.3d at p. 811.) She turned and put her arm over the back of the seat, then faced forward and bent to the floor, before returning to a sitting position. (*Ibid.*) The officer opened the passenger door and looked inside. (*Id.* at pp. 811-812.) He saw green stems and seeds, ordered the woman out, and searched the car, finding marijuana. (*Id.* at p. 812.) The Supreme Court held the act of opening the door and looking inside was an unreasonable search. (*Ibid.*)

Acknowledging that sudden movements suggesting concealment may be expressions of consciousness of guilt, the *Kiefer* court was nonetheless concerned with the "potential for misunderstanding" of ambiguous gestures. (*Kiefer, supra*, 3 Cal.3d at pp. 817-818.) "It is because of this danger that the law requires more than a mere 'furtive gesture' to constitute probable cause to search or to arrest." (*Kiefer, supra*, at p. 818.) The court in *Kiefer* concluded that the woman's furtive

gesture did not authorize the officer to search the car for contraband. (*Id.* at p. 828.)

Here, however, unlike the situation in *Kiefer*, minor did not make an isolated furtive motion. Here, a plethora of additional suspicious facts was present. Minor had already noticed the uniformed police officer, had shown concern at the officer's presence, and had turned and walked quickly away while acting as if concealing something in his waistband, *despite* having been ordered multiple times to stop and the fact that Keeney had drawn his gun. Minor then *continued* to behave suspiciously as he walked quickly away from Keeney--he looked back at Keeney and continued to fumble with his hands at his waistband and bend over as if trying to hide something. After Keeney ran to catch minor, minor refused to either stop walking or to put up his hands and stop moving until threatened with a Taser. Minor was not fully and formally detained until *after* these events took place, when he finally complied with Keeney's multiple demands to put up his hands. (See *California v. Hodari D.* (1991) 499 U.S. 621, 626 [113 L.Ed.2d 690, 697] [seizure for Fourth Amendment purposes "requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority"], original italics.)

Further, the anonymous tip, while in and of itself is not sufficient to justify detention, does provide support for the reasonableness of Keeney's suspicions in this case. He was responding to a report of a juvenile with a large knife amongst a group of juveniles. While only minor was present when Keeney

arrived at the scene, minor's actions were completely consistent with someone trying to hide a knife or some other weapon in his waistband. Thus the tip, while of limited value on its own, still provided important context for Keeney's suspicion.

Minor's concern at Keeney's arrival, coupled with his refusal to stop and his rapid movement away from Keeney, also support the validity of minor's temporary detention. (See *In re H.M.* (2008) 167 Cal.App.4th 136, 144 [flight through traffic from police coupled with repeated glances behind minor pertinent factors in determining reasonable suspicion]; *People v. Souza, supra*, 9 Cal.4th at p. 235 [flight from the police is a factor supporting reasonable suspicion to detain]; *Illinois v. Wardlow* (2000) 528 U.S. 119, 121-122 [145 L.Ed.2d 570, 574-575] [same]).

Clearly minor's actions in their totality, together with the information already known by Keeney, supported Keeney's reasonable suspicion that minor was trying to conceal a weapon. We conclude the juvenile court did not err when it determined the stop was supported by reasonable suspicion.

II

The Search

Minor argues that even if the stop were reasonable, the subsequent lifting of minor's shirt constituted a search and exceeded the scope of a lawful patdown. We are not persuaded.

Under *Terry, supra,* 392 U.S. 1 [20 L.Ed.2d 889], an officer may conduct a reasonable search of a nonarrestee for weapons for the officer's protection if the officer has reason to believe he is dealing with an armed and dangerous individual. (*Terry,*

supra, at pp. 26-27 [20 L.Ed.2d at p. 909]; *People v. Scott* (1976) 16 Cal.3d 242, 249.)

A protective search must be strictly "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." (*Terry, supra*, 392 U.S. at p. 26 [20 L.Ed.2d at p. 908].) If the protective search goes beyond what is necessary to determine if the person is armed, the search is no longer valid and its fruits will be suppressed. (*Sibron v. New York* (1968) 392 U.S. 40, 65-66 [20 L.Ed.2d 917, 936].) Because the sole justification for the search is the protection of the officer, the search "must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." (*Terry, supra*, 392 U.S. at p. 29 [20 L.Ed.2d at p. 911].)

Terry, however, never articulated any specific limitations when an officer searches for weapons, noting "limitations will have to be developed in the concrete factual circumstances of individual cases." (*Id.* at p. 29 [20 L.Ed.2d at p. 910].) Accordingly, *Terry* does not limit a weapons search to a patdown or frisk. (See *People v. Mendoza* (2011) 52 Cal. 4th 1056, 1082 ["[B]ecause protection of the officer and others nearby is the sole justification, the search must be 'confined in scope to an intrusion reasonably designed to discover guns . . . '"]; *United States v. Thompson* (9th Cir. 1979) 597 F.2d 187, 191.) To the contrary, any limited intrusion designed to discover weapons is permissible. (*United States v. Hill* (9th Cir. 1976) 545 F.2d

1191, 1193.) Nonintrusive, reasonable means other than a mere patdown are permissible where those other means are necessary under the circumstances to ensure the person is not armed. (See, e.g., *United States v. Thompson, supra*, 597 F.2d at p. 191 [where person was wearing bulky coat, reaching into coat pocket was permissible; patdown would not have determined whether coat contained weapon].)

The United States Supreme Court discussed the flexibility of *Terry* searches in *Adams v. Williams* (1972) 407 U.S. 143 [32 L.Ed.2d 612] (*Adams*). In *Adams*, a known informant told the officer that an individual seated in a nearby vehicle was carrying narcotics and had a gun in his waist. (*Adams, supra*, 407 U.S. at pp. 144-145 [32 L.Ed.2d at p. 616].) The officer went up to the car, tapped on the window, and asked the suspect, Williams, to open the door. (*Ibid.*) When Williams rolled down the window, the officer reached in and grabbed a gun out of his waistband. (*Adams, supra,* at p. 145 [32 L.Ed.2d at p. 616.) The gun was not visible to the officer from outside the car, but was in precisely the place described by the informant. (*Ibid.*) In upholding the *Terry* search, the Supreme Court concluded: "When Williams rolled down his window, rather than complying with the policeman's request to step out of the car so that his movements could more easily be seen, the revolver allegedly at Williams' waist became an even greater threat. Under these circumstances the policeman's action in reaching to the spot where the gun was thought to be hidden constituted a limited intrusion designed to insure his safety, and we conclude that it

was reasonable. The loaded gun seized as a result of this intrusion was therefore admissible at Williams' trial. [Citation.]" (*Id.* at p. 148 [32 L.Ed.2d at p. 618].)

Here, the officer clearly had reasonable suspicion to believe that minor was hiding a weapon in his waistband. He conducted a limited detention and search of minor's waistband, in order to address his well-developed concern that minor was armed and thus a threat to officer (as well as public) safety. The officer's conduct here was not inconsistent with *Terry* and its progeny.[4]

DISPOSITION

The judgment is affirmed.

DUARTE, J.

We concur:

BLEASE, Acting P. J.

HULL, J.

[4] California cases suppressing evidence found after an officer pulled up a sweater (*Byrd v. Superior Court of Los Angeles County* (1968) 268 Cal.App.2d 495, 496-497 (*Byrd*)), and opened a coat (*People v. Aviles* (1971) 21 Cal.App.3d 230, 234 (*Aviles*)), are inapposite because there was no evidence that the officer was afraid for his safety in either case. (See *Byrd, supra,* 268 Cal.App.2d at pp. 496-497; *Aviles, supra,* 21 Cal.App.3d at pp. 231-232, 234.)